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# In the Supreme Court of the United States

OCTOBER TERM, 1964.

No. 791.

UNITED MINE WORKERS OF AMERICA,

*Petitioner,*

vs.

R. P. PRICE, C. H. KELLY and FOLLACE FIELDS,
Partners, d/b/a ELKHORN COAL COMPANY,

*Respondents.*

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT.

## BRIEF FOR RESPONDENTS IN OPPOSITION.

LOGAN E. PATTERSON,
Pineville, Kentucky,
JAMES S. GREENE, JR.,
Harlan, Kentucky,
*Counsel for Respondents.*

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—PHONE: 621-9647

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# In the Supreme Court of the United States

OCTOBER TERM, 1964.

No. 791.

UNITED MINE WORKERS OF AMERICA,

*Petitioner,*

vs.

R. P. PRICE, C. H. KELLY and FOLLACE FIELDS, Partners, d/b/a ELKHORN COAL COMPANY,

*Respondents.*

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT.

## BRIEF FOR RESPONDENTS IN OPPOSITION.

*To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:*

Respondents R. P. Price, C. H. Kelly and Follace Fields, partners, doing business as Elkhorn Coal Company, in opposition to the petition for writ of certiorari filed herein, respectfully represent:

## QUESTIONS PRESENTED.

1.

In an action under Section 303, Labor Management Relations Act of 1947, against a labor union for damages claimed to have resulted from a labor dispute wherein plaintiffs contended that certain tactics of defendant constituted violations of Section 303 by the union and that

the union's entire course of conduct during the dispute also constituted unlawful interference with plaintiffs' business violative of state common law, did the District Court have jurisdiction to determine liability under the common law or non-federal grounds asserted in support of the single cause of action?

2.

Where the common law of a state permits recovery of punitive damages for wilful and malicious wrong, and one of the grounds supporting an alleged cause of action is based upon violation of such common law, and the evidence shows violence and intimidation sufficient to establish such a violation, is the federal court precluded from awarding such damages because jurisdiction is conferred upon it by a supporting ground charging violation of Section 303, Labor Management Relations Act of 1947?

## STATEMENT OF THE CASE.

While the petitioner, in its statement of the case, has related the facts at some length, has criticized the instructions and interrogatories of the trial court, and has pointed out how the Court of Appeals, in deciding this case adversely to it, failed to properly interpret various points which petitioner had presented, nevertheless, its argument for granting the writ is confined to the two questions as herein stated.

The petitioner, in its argument, does not question the sufficiency of the evidence to establish its violation of § 303 or its wilful and malicious violation of the common law of Kentucky, or to support the award of damages to respondents, yet, its statement of the facts, rather than being given in the light most favorable to respondents,* is set forth in the most advantageous light to petitioner and contrary to the view of the evidence taken by the jury, the trial court and the court of appeals.

For this reason, and in order to present the material facts in their proper perspective, the following resumé is made.

The nature of this action and the questions involved upon this petition arise out of the unlawful union activities occurring in 1959 in the Kentucky-Tennessee coal fields. Similar cases have been previously considered by both the Court of Appeals for the Sixth Circuit and by this Court. This is noted in the Sixth Circuit's opinion as follows (A 1-3**):

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* A principle sanctioned in *Taylor v. Mississippi*, 319 U. S. 583; *McFall v. Tooke*, 6 Cir., 308 F. 2d 617, 619.

** Numeral followed by the small letter "b" refers to the page of the appendix filed in the Court of Appeals by the respondents (plaintiffs-appellees), and here certified upon appeal.

*(Continued on following page)*

"This appeal presents questions concerning the liability of United Mine Workers of America under Section 303 of the Labor-Management Relations Act, 1947, and the common law of Kentucky, for damages to Elkhorn Coal Company's business and property sustained by reason of the alleged commission by the Union of unlawful acts of secondary boycott, violence and depredation during an organizational strike in the coal fields of the Hazard-Letcher County, Kentucky, area in 1959.

"The case was tried before a jury in the District Court resulting in a plaintiffs' verdict based on answers to interrogatories, in which the jury fixed compensatory damages at $150,000 and punitive damages at $100,000.

"Two cases arising out of the same strike in Kentucky have been before this Court. *Flame Coal Co. v. United Mine Workers of America,* 303 F. 2d 39 (CA 6, 1962) cert. denied 371 U. S. 891; *Sunfire Coal Co., et al. v. United Mine Workers of America,* 313 F. 2d 108 (CA 6, 1963) cert. denied 375 U. S. 924. In these cases the activities of UMW were revealed and need be repeated only briefly here.

"The strike extended into the coal fields of Tennessee where similar acts of depredation were committed. These acts were detailed in our opinions in *Allen v. United Mine Workers of America,* 319 F. 2d 594 (CA 6, 1963); *White Oak Coal Co. v. United Mine Workers of America,* 318 F. 2d 591 (CA 6, 1963) cert. denied 375 U. S. 966; *Gilchrist v. United Mine Workers of America,* 290 F. 2d 36 (CA 6, 1961) cert. denied 368 U. S. 875 and *United Mine Workers of*

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*(Continued from preceding page)*

Numeral followed by the small letter "a" refers to the page of the appendix filed in the Court of Appeals by the petitioner (defendant-appellant) and here certified upon appeal. The capital letter "A," followed by numeral refers to the page of the appendix bound with the petition for writ of certiorari, filed herein by the petitioner (who was defendant-appellant in the Court of Appeals).

*America v. Osborne Mining Co.*, 279 F. 2d 716 (CA 6, 1960) cert. denied 364 U. S. 881.

"Many of the questions raised in the present appeal have been repeatedly urged before us and decided adversely to UMW in the cases cited in the preceding paragraphs."

As to the character and sufficiency of the evidence in the instant case, the opinion of the Court of Appeals is again quoted, with supporting record references being supplied (A 7-8):

"The evidence, together with the inferences properly deducible therefrom, was sufficient to require submission of the factual issues to the jury.

"The jury could find that the picketing was aimed not only at plaintiffs, but at about one hundred seventy-six coal operators in the field (291a-292a). Everyone in the field was affected (208a-209a). UMW was attempting to 'persuade' coal operators to sign the National Bituminous Coal Wage Agreement as amended (291a-292a). Plaintiffs refused to sign it for two reasons: operations under it would be unprofitable and the agreement prohibited them from purchasing any coal from anyone except signers of the agreement (4b). Plaintiffs did not mine coal (30a-33a). They purchased most of the coal which they processed and sold from small non-union operators (33a) Plaintiffs processed the coal at their tipples (32a-33a).

"The picketing extended to plaintiffs' employees and also mine operators and their employees, who supplied plaintiffs with coal, and truck drivers and their employees, who delivered coal to plaintiffs' tipples (38a, 91a-96a, 112a, 116a, 119a, 150a-151a, 177a-178a). The picketing was at tipples and at other areas in the field (91a-93a, 112a, 116a, 119a, 176a-178a, 187a, 190a-191a, 209a). The method of persuasion was as follows:

"Whole mobs of men congregated (186a-187a, 207a). They heard addresses from UMW officials and then started out in huge motorcades to stop the mining operations of all mine operators in the field (186a-189a, 207a-208a). As many as four hundred to five hundred men picketed plaintiffs' Mayking tipple on one occasion and one thousand men at other places in the field (112a, 119a, 155a, 192a, 209a, 231a-232a, 259a-261a). Vile and abusive language was used (91a, 119a-121a, 221a); rocks were thrown at trucks (121a); truck drivers were threatened with bull whips and shot at (116a, 177a, 181a, 183a, 216a-217a, 221a, 223a); shots were fired at the Mayking tipple, and at houses occupied by plaintiffs' employees (96a, 116a, 120a, 122a, 125a-126a, 130a, 137a); the Kona tipple was set on fire and destroyed (42a, 147a); state police and the National Guard were called (186a, 195a-196a); injunctions were obtained from courts (12b)."

As to the petitioner's complaints with regard to the trial court's instructions, the Sixth Circuit commented as follows (A 8; record references supplied):

"The Court did not err in his instructions to the jury. He read Section 303 to the jury and properly instructed them as to the law of secondary boycotts (522a-524a, 526a-527a). He told the jury repeatedly that the Union had the lawful right to strike and to picket and was liable for damages only for unlawful acts which it committed or authorized (521a-526a, 528a-530a). He gave illustrations and examples of the type of conduct which was unlawful (523a-524a, 527a-530a)."

A portion of petitioner's statement of the case is devoted to the thesis that the Sixth Circuit misconceived the issues of federal preemption and pendent jurisdiction as raised by it. A reading of this presentation reveals that rather than a misconception of the issues by the Court of

Appeals it is the petitioner that has misconceived the law applicable to these issues, and that this misconception is primarily due to three reasons.

First, the petitioner has arbitrarily classified all of its conduct disclosed by the evidence as either primary or secondary picketing activity. Whereas, the violence and depredations complained of as being in breach of the common law of Kentucky are unrelated to labor relations as such. Respondents are familiar with no case nor any law which identifies or describes "picketing" so as to include such activities as shooting into a coal tipple from a hill 200 to 300 yards distant (94a, 116a, 223a); shooting into the mining operation of a supplier of coal (183a); shooting out lights, and shooting into cars of employees over a protracted period (130a); or riddling the homes of employees while those employees are away at work and the homes are occupied by women and children (126a-127a, 136a-137a).

Second, petitioner refuses to acknowledge that "A cause of action does not consist of facts * * * but of the unlawful violation of a right which the facts show. The number and variety of the facts alleged do not establish more than one cause of action so long as their result, whether they be considered severally or in combination, is the violation of but one right by a single wrong." * Hence, petitioner's refusal to accept the fact that the case at bar presents only a single cause of action, the unlawful interference with, and damage to, the property and business of the respondents, supported by two grounds, (1) unlawful secondary boycott activity in violation of § 303, Labor Management Relations Act of 1947, and (2) unlawful violence and depredations in breach of the common law of Kentucky.

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* *Hurn v. Oursler,* 289 U. S. 238, 246.

Third, the petitioner misconceives the applicable principles of law set forth in the cases of *United Construction Workers v. Laburnum Corp.*, 347 U. S. 656, *United Automobile Workers v. Russell*, 356 U. S. 634, and *Local 20, Teamsters, Chauffeurs, and Helpers' Union v. Morton*, 377 U. S. 252. This will be taken up in the argument, as will its complaint concerning the trial court's instructions on punitive damages.

## THE ARGUMENT.

### I.

### DOCTRINE OF ANCILLARY OR PENDENT JURISDICTION AS FOLLOWED BY LOWER COURTS IS SUPPORTED BY APPLICABLE DECISIONS OF THIS COURT.

Petitioner denies the jurisdiction of the district court to entertain a case where a claim under § 303, Labor Management Relations Act of 1947 (29 USC 187) is joined with a non-federal common law action for tort, saying that the rule of ancillary or pendent jurisdiction is inapplicable because, (1) it is precluded by the doctrine of federal preemption, and (2) the factual situation involving a common law claim must of necessity be "juridically distinct" from that which serves to establish a violation of § 303.

Basically, this is the same question which has been considered and disposed of, contrary to petitioner's contention, in the cases of *Meadow Creek Coal Company v. United Mine Workers of America*, 6 Cir., 263 F. 2d 52, cert. denied 359 U. S. 1013; *Osborne Mining Company v. United Mine Workers of America*, 6 Cir., 279 F. 2d 716, cert. denied 364 U. S. 881; *Gilchrist v. United Mine Workers of America*, 6 Cir., 290 F. 2d 36, cert. denied 368 U. S. 875; *Flame Coal Company v. United Mine Workers of America*, 6 Cir., 303 F. 2d 39, cert. denied 371 U. S. 891; *Sunfire Coal Company v. United Mine Workers of Amer-*

*ica*, 6 Cir., 313 F. 2d 108, cert. denied 375 U. S. 924; and *White Oak Coal Company v. United Mine Workers of America*, 6 Cir., 318 F. 2d 591, cert. denied 375 U. S. 966, rehearing denied _____ U. S. _____, 13 L. Ed. 2d 77.

In its petition for certiorari in *Gilchrist*, the petitioner submitted this question in the following form:

> "In an action against a labor union for damages claimed to have resulted from a labor dispute under Section 303 of the Act wherein plaintiffs contended that certain actions which occurred during the dispute constituted violations of Section 303 by the union and that the union's entire course of conduct during the dispute constituted unlawful interference with plaintiffs' businesses violative of State common law, did the District Court have jurisdiction to determine liability under the common law or non-Federal cause of action?"

In its petition for certiorari in *Flame*, the petitioner submitted this question in this form:

> "In an action instituted in a federal district court by an employer against an unincorporated labor union in its common name for damages and the district court's jurisdiction is asserted under Section 303, Labor-Management Relations Act, 1947, and there is no diversity of citizenship of the parties (a) does the district court have jurisdiction, power and authority under the doctrine of pendent or ancillary jurisdiction to determine the issues in a non-federal tort action joined with a claim under said section, where state courts in the state in which the alleged wrongful conduct occurred and wherein the federal district is sitting would not entertain jurisdiction of a suit based upon the non-federal claim against the union in its common name; and (b) *does the doctrine of federal preemption preclude the applicability of the pendent or ancillary jurisdiction in such action?*" (Emphasis added.)

In its petition for certiorari in *Sunfire*, the petitioner submitted this question in the exact form as in the *Flame* case.

Following denial of its petition for certiorari in the *White Oak* case, in which this same basic question had been presented, the petitioner filed its petition for rehearing, contending that the recently decided case of *Local 20, Teamsters, Chauffeurs and Helpers' Union v. Morton*, 377 U. S. 252, supported its position on this point. Although the petition for rehearing was denied (____ U. S. ____, 13 L. Ed. 2d 77), the petitioner is again asserting that the *Morton* case is authority in support of its argument on this point.

In trying to make the *Morton* case applicable to the instant case, the petitioner assumes the validity of two of its own premises, namely, (1) that this Court has rejected the doctrine of pendent jurisdiction in favor of the doctrine of federal preemption in all cases where the federal labor laws are involved, and (2) that the respondents' recovery is predicated upon two types of conduct, "secondary picketing" and "primary picketing." Neither of these premises is tenable.

In the recent case of *Rumbaugh v. Winifrede Railroad Co.*, 4 Cir., 331 F. 2d 530, 539, the doctrine of pendent jurisdiction is thus described:

> "The origin of this doctrine is generally attributed to the case of *Hurn v. Oursler*, 289 U. S. 238, 53 S. Ct. 586, 77 L. Ed. 1148 (1933). In broad terms it provides that original jurisdiction resting on the plaintiff's federal claim extends to any nonfederal claim that he may have against the same defendant provided that the federal question is substantial and the two claims together constitute a 'single cause of action'."

Whatever may be the effect upon the application of this doctrine to a given case, there is nothing in the *Morton* opinion at variance with this generalized definition of the doctrine.

As stated in the *Morton* opinion, the doctrine of federal preemption is simply that "incompatible doctrines of local law must give way to principles of federal labor law." The doctrine, of course, is one of general application, and is not limited to the field of labor law.* Respondents agree with petitioner to the effect that in an area where such incompatible preemption actually applies, "the states may not act concurrently, nor may state laws be applied in coincidence with, as complimentary to or as in opposition to, federal enactments." State laws cannot be enforced in state courts whenever they conflict with preemptive federal law. Further, as it pointed out in *Morton*, "if the state court would be without authority to award damages under state law, then the doctrine of pendent jurisdiction can give 'the District Court * * * no greater power to do so.' "

With these principles in mind, it is pertinent to consider whether this Court in the *Morton* opinion in any way limited the application of the doctrine of pendent jurisdiction or reasserted the doctrine of federal preemption so as to support the argument of the petitioner.

The *Morton* suit was an action for "damages for business losses caused by the [union's] allegedly unlawful conduct during [a] strike." After trial without a jury, the court awarded four separate and distinct items of damage, to-wit: damages for business losses caused by violation of § 303, Labor Management Relations Act; compensatory damages for violation of an Ohio law, said to prohibit

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* i.e., *Napier v. Atlantic Coast Line R. Co.*, 272 U. S. 605.

"making direct appeals to a struck employer's customers or suppliers to stop doing business with the struck employer"; damages for loss of a contract resulting from lack of employees during the strike; and punitive damages "although expressly finding that the petitioner's conduct during the strike had at all times been free of any violence."

The damages arising out of a violation of § 303 of the Act were affirmed. There was a reversal as to all other items. Said this Court:

> "With respect to the remaining components of the money judgment recovered by the respondent, *the central question to be decided* is whether a court, state or federal, is free to apply state law in awarding damages resulting from *a union's peaceful strike conduct vis-a-vis a secondary employer*, or is confined in the field of damage actions *brought for union secondary activities* to the specifically limited provisions of § 303 of the Federal Act. We disagree with the Court of Appeals that *this question* can be resolved either by reference to the doctrine of pendent jurisdiction or by reference to the line of precedents which have permitted state law to be applied in situations where union activities involving violence were present." (Emphasis supplied.)

Does this constitute a limitation of the doctrine of pendent jurisdiction as broadly outlined in *Hurn v. Oursler*, 289 U. S. 238, or make inapplicable such case precedents as *Meadow Creek, Osborne, Gilchrist, Flame, Sunfire* and *White Oak*?*

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* *Meadow Creek Coal Co. v. United Mine Workers of America*, 6 Cir., 263 F. 2d 52, cert. denied 359 U. S. 1013; *Osborne Mining Company v. United Mine Workers of America*, 6 Cir., 279 F. 2d 716, cert. denied 364 U. S. 881; *Gilchrist v. United Mine Workers of America*, 6 Cir., 290 F. 2d 36, cert. denied 368 U. S. 875; *Flame Coal Co. v. United Mine Workers of America*,

*(Continued on following page)*

We think not. In the next following paragraph this Court cites *Hurn v. Oursler* as authority for the proposition that "Pendent jurisdiction permits a federal court under some circumstances to determine a state cause of action which otherwise would have to be heard in the state court." Nor is this all. It is further said that:

> "And in cases involving union violence, state law has been permitted to prevail by reason of controlling considerations which are entirely absent in the present case. '[W]e have allowed the States to grant compensation for the consequences, as defined by the traditional law of torts, of conduct marked by violence and imminent threats to the public order. * * *' "

At eleven places in the relatively short *Morton* opinion, this Court makes it clear that the principles which it applies are applicable to *peaceful* conduct as contrasted with *violent* behavior. It is made clear that state law remedies are preserved where strike activities are accompanied by violence, an impossible paradox if it were a fact, as contended by petitioner, that federal labor law has preempted the field of all labor activities, including those which are violent.

The true reasoning in the *Morton* case with reference to the application of the doctrine of federal preemption is found in this Court's declaration that the "basic question * * * is whether 'in a case such as this, incompatible doctrines of local law must give way to principles of federal labor law' * * *. The answer to that question ultimately depends upon whether the application of state law in this

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*(Continued from preceding page)*

6 Cir., 303 F. 2d 39, cert. denied 371 U. S. 891; *Sunfire Coal Co. v. United Mine Workers of America*, 6 Cir., 313 F. 2d 108, cert. denied 375 U. S. 924; *White Oak Coal Co. v. United Mine Workers of America*, 6 Cir., 318 F. 2d 591, cert. denied 375 U. S. 966.

kind of case would operate to frustrate the purpose of the federal legislation."

In the *Morton* case, the union had made a peaceful and direct appeal to an employer-customer to cease doing business with Morton. The trial court "held that the request to Launder management was permissible activity under federal law, but ruled that this conduct violated the common law of Ohio * * *." This Court declared that " '[A] union is free to approach an employer to persuade him to engage in a boycott, so long as it refrains from the specifically prohibited means of coercion through inducement of employees.' * * * This weapon of self-help *permitted by federal law*, formed an integral part of the petitioner's effort to achieve its bargaining goals during negotiations with the respondent. Allowing its use is a part of the balance struck by Congress between the conflicting interests of the union, the employees, the employer and the community. * * * If the Ohio law of secondary boycott can be applied to proscribe the same type of conduct which Congress focused upon but did not proscribe when it enacted § 303, the inevitable result would be to frustrate the congressional determination to leave this weapon of self-help available, and to upset the balance of power between labor and management expressed in our national labor policy. 'For a state to impinge on the area of labor combat designed to be free is quite as much an obstruction of federal policy as if the state were to declare picketing free for purposes or by methods which the federal Act prohibits.' " (Emphasis supplied.)

In *Morton*, therefore, this Court applied the doctrine of preemption (which automatically eliminated the doctrine of pendent jurisdiction) for the reason that the common law remedy impinged upon and tended "to frus-

trate the purposes of the federal legislation," in that the state law had the effect of prohibiting "the same type of conduct which Congress focused upon but did not proscribe." It is not perceived how this can be of any application to the case at bar. Respondents are not familiar with any case or any legislative history to indicate that Congress focused upon and intended to permit, as a weapon of self-help, the right to curse and abuse people in and about a place of business, to repeatedly shoot into that place of business, to shoot into the occupied homes of employees, to shoot at persons seeking to take part in the conduct of a legitimate business, to burn and dynamite business property, or to attack unoffending employees with bull whips.

As is pointed out in the *Morton* opinion, the right to recover damages suffered from conduct marked by violence, on a state law basis, has been recognized by this Court in the cases of *United Automobile Workers v. Russell*, 356 U. S. 634, and *United Construction Workers v. Laburnum Corp.*, 347 U. S. 656. The fact that these cases originated in a state court rather than a federal court, as emphasized by petitioner, makes no difference whatever in testing the principles of law which petitioner discusses as "pendent jurisdiction" and "federal preemption." If federal preemption had been applicable in either case, the state courts would have been precluded from entertaining the suit, whereas this Court decided the very converse of that proposition. If the doctrine of preemption did not apply (and this Court said that it did not), then the doctrine of pendent jurisdiction could have been applied in a federal court had the plaintiffs had a single cause of action and one of the grounds in support thereof would permit the invocation of federal jurisdiction.

Petitioner would make inapplicable, and distinguish,

the *Laburnum* case with the assertion that this Court sustained the state judgment on the theory that there was no compensatory relief under the federal act. This argument was expressly rejected in the *Russell* case as follows (pages 641-642):

> "We assume, for the purpose of argument, that the Board would have had authority to award back pay to Russell. Petitioners assert that the possibility of partial relief distinguishes the instant case from Laburnum. It is our view that Congress has not made such a distinction and that it has not, in either case, deprived a victim of the kind of conduct here involved of common-law rights of action for all damages suffered."

In this regard, attention is also called to the fact that in both the *Laburnum* and the *Russell* cases it was assumed by this Court that the unions' conduct, which resulted in the damage awards, did violate § 8(b) (1) (A), Labor Management Relations Act of 1947 [29 USC § 158(b) (1) (A)].

Petitioner returns to its unique and now familiar argument that "pendent jurisdiction" is a self-destructive phenomenon. It poses a syllogism that, (1) the doctrine of pendent jurisdiction as enunciated in *Hurn* necessitates that both federal and nonfederal claims "so precisely rest upon identical facts as to be little more than the equivalent of different epithets to characterize the same group of circumstances"; (2) where the facts are identical the doctrine of preemption must apply; and (3) therefore there can be no pendent jurisdiction because the very circumstances *required* as its basis give rise to the doctrine of preemption, which in turn destroys it. Nothing to this effect is perceived in the *Morton* opinion, or in the cases involving many other fields of federal law, where the

doctrine of pendent jurisdiction has been applied.* *Hurn* does not necessitate that the federal and nonfederal claims rest upon precisely identical facts. It is merely an observation of this Court that in *that particular case* "the claims of infringement and unfair competition so precisely rest on identical facts as to be little more than the equivalent of different epithets to characterize the same group of circumstances."

Here, as in the case precedents arising out of the same union organizational activities of 1959, there is but a single cause of action, that of the wrongful interference with the business of the respondents, supported by two grounds, one, proscribed secondary boycott, and two, violence and depredations in breach of the common law. In this Court's case of *Baltimore S. S. Co. v. Phillips*, 274 U. S. 316, this point is well illustrated. There the court below had concluded that a cause of action set up in a second suit was not the same as that alleged in a first suit because grounds of negligence pleaded were distinct and different in character. In pointing out the error of the trial court, this Court said (page 321):

> "Upon principle, it is perfectly plain that the respondent suffered but one actionable wrong and was entitled to but one recovery, whether his injury was due to one or the other of several distinct acts of al-

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* i.e., *Armstrong Paint and Varnish Works v. Nu-Enamel Corp.*, 305 U. S. 315 (trademark law); *Jordine v. Walling*, 3 Cir., 185 F. 2d 662 (Jones Act); *Strachman v. Palmer*, 1 Cir., 177 F. 2d 427 (Federal Transportation Act); *Errion v. Connell*, 9 Cir., 236 F. 2d 447 (Securities and Exchange Act); *Southside Theatres v. United West Coast Theatres Corporation*, 9 Cir., 178 F. 2d 648 (Sherman and Clayton Acts); *Manosky v. Bethlehem Hingham Shipyard*, 1 Cir., 177 F. 2d 529 (Fair Labor Standards Act); *Gulley v. First National Bank of Meridian*, 5 Cir., 81 F. 2d 502 (Acts pertaining to National banks); and *American Fidelity & Casualty Company v. Owensboro Milling Company*, 6 Cir., 222 F. 2d 109 (Diversity of citizenship).

leged negligence or to a combination of some or all of them. In either view, there would be but a single wrongful invasion of a single primary right of plaintiff, namely, the right of bodily safety, whether the acts constituting such invasion were one or many, simple or complex."

The requisite test of pendent jurisdiction is that there be but a single cause of action, rather than, as urged by petitioner, that the facts supporting both the federal and the nonfederal grounds be precisely identical.

## II.

## RECOVERY OF PUNITIVE DAMAGES FOR VIOLATION OF COMMON LAW OF KENTUCKY WAS PROPER AND IS SUPPORTED BY APPLICABLE DECISIONS OF THIS COURT.

This argument of the inability of the court to allow recovery of punitive damages where violation of a provision of the Labor Management Relations Act of 1947 is involved has been repeatedly raised on behalf of union defendants beginning with the case of *United Construction Workers v. Laburnum Corp.*, 347 U. S. 656, where this argument was first rejected by this Court. In the later case of *United Automobile Workers v. Russell*, 356 U. S. 634, this point was again raised and was discussed at length in the opinion of the Court. In that case, as here, it was urged that as the Act afforded Russell compensatory relief, he was deprived of common law rights of action for all damages suffered, but to no avail. Again, in the case of *San Diego Building Trades Council v. Garmon*, 359 U. S. 236, this Court pointed out that it was conduct "marked by violence and imminent threats to the public order" and "intimidation and threats of violence" which supported the allowance of the remedy of punitive damages under state law in the *Laburnum* and *Russell* cases.

Thereafter, this Court refused to grant certiorari in *Meadow Creek*, *Osborne*, *Gilchrist*, *Flame* and *White Oak*, in each of which the Court of Appeals for the Sixth Circuit sustained an award of punitive damages under state law.

Because this Court disapproved the allowance of punitive damages in the *Morton* case, petitioner insists that such disapproval established error in the allowance of punitive damages in the instant case. All the Court said in the *Morton* opinion was that "this question"—the question actually before it and stated as the "central question"—could not be resolved "by reference to the line of precedents which have permitted state law to be applied in situations where union activities involving violence were present." This Court did not say or indicate that such "line of precedents" were in error, or were discredited. It merely said that they were not pertinent to the question before it, namely, "whether a court, state or federal, is free to apply state law in awarding damages resulting from a union's *peaceful* strike conduct vis-a-vis a secondary employer, or is confined in the field of damage actions *brought for union secondary activities* to the specifically limited provisions of § 303 of the Federal Act." (Emphasis supplied.)

In disapproving the allowance of punitive damages in the *Morton* case, this Court said:

> "Punitive damages for violations of § 303 conflict with the congressional judgment, reflected both in the language of the federal statute and in its legislative history, that recovery for an employer's business losses *caused by a union's peaceful secondary activities* proscribed by § 303 should be limited to actual, compensatory damages. And insofar as *punitive damages* in this case were *based on secondary activities* which violated only state law, they cannot stand, because, as we have held, substantive state law *in this*

> *area* must yield to federal limitations. * * * Accordingly, we hold that since state law has been displaced by § 303 in private damage actions *based on peaceful union secondary activities,* the District Court in this case was without authority to award punitive damages." (Emphasis supplied.)

As regards the allowance of punitive damages, this statement of the Court in no way conflicts with the case precedents of *Laburnum, Russell, Meadow Creek, Osborne, Gilchrist* or *Flame,* as is further indicated by the denial of the petition for rehearing, which particularly stressed the *Morton* case on this very point, in the *White Oak* case [*United Mine Workers of America v. White Oak Coal Co.,* 318 F. 2d 591 (CA 6, 1963) cert. denied 375 U. S. 966, petition for rehearing denied October 12, 1964, __ U. S. __, 13 L. Ed. 2d 77].

Nor is there any basis for petitioner's professed belief that "it is not possible to determine if the jury's award of punitive damages related to violations of § 303 or of Kentucky's common law." The court instructed the jury "You are not to allow damages because of anything that occurred at other mines * * *" (528a). And that "you must limit your assessment of damages to injuries sustained by the plaintiffs, and you shall not consider or include any injury to any other person or companies or to the property of any other person or companies" (530a-531a). As for punitive damages, the jury was instructed (531a):

> "Now, punitive damages—the word 'punitive' means punishment—punitive damages are damages other than compensatory or nominal damages, awarded against a person to punish him for his outrageous conduct. The purpose of awarding punitive damages, sometimes called 'smart money,' is to punish the person doing the wrongful act and to discourage such person and others from similar conduct in the future.

> *Such damages are proper only when the wrongful act is wanton, malicious and reckless.* There must be a showing that the acts were either wilful or malicious or that they were performed in such a way to indicate a gross negligence or disregard for the rights of the person wronged." (Emphasis supplied.)

There was no evidence of secondary activity at the respondents' business site within the scope of such activity as delineated in *Local 761, Electrical Workers v. NLRB,* 366 U. S. 667, and *United Steelworkers v. NLRB,* 376 U. S. 492, cited in the petition. Therefore, in the allowance of punitive damages, the jury was confined by the instructions of the court and by the factual situation presented to those damages which, (1) were the result of wanton, malicious, and reckless conduct, (2) took place at the respondents' place of business, and (3) were not secondary in their nature. This was probably more than the petitioner was entitled to, but it should leave no fear that punitive damages were awarded because of "peaceful secondary activities" such as were under consideration in *Morton.*

That punitive damages constitute a well-settled form of relief under the law of Kentucky when there is a wilful and malicious wrong is apparent from the decision in the case of *United Construction Workers v. Laburnum Corp.,* 194 Va. 872, 75 S. E. 2d 694, 347 U. S. 656. In that case, in which the violent conduct of the union followed a similar pattern to that in the present case, the Court approved the allowance by a jury of $100,000 punitive damages. See also the cases of *Engelman v. Caldwell and Jones,* 243 Ky. 23, 47 S. W. 2d 971, and *L. & N. Railroad Company v. Ritchel,* 148 Ky. 701, 147 S. W. 411.

This same general pattern of conduct in both the *Laburnum* case and in the case at bar was substantially simi-

lar in most respects to that pattern portrayed in the *Meadow Creek, Osborne, Gilchrist, Flame* and *White Oak* cases, in all of which the allowance of punitive damages was approved. Here, as noted in the opinion of the Court of Appeals (A 8) "mobs of men congregated" ranging from four and five hundred to one thousand, "[v]ile and abusive language was used; rocks were thrown at trucks; truck drivers were threatened with bull whips and shot at; shots were fired at the Mayking tipple, and at houses occupied by plaintiffs' employees; the Kona tipple was set on fire and destroyed; state police and the National Guard were called; injunctions were obtained from courts."

It is evident that under the facts in this case, the decision of the Court of Appeals, in approving the award of punitive damages, is in full accord with the case decisions of this Court on the subject.

## CONCLUSION.

The respondents believe themselves entitled to a denial of the Petition for Writ of Certiorari herein presented.

Respectfully submitted,

LOGAN E. PATTERSON,
Pineville, Kentucky,

JAMES S. GREENE, JR.,
Harlan, Kentucky,
*Counsel for Respondents.*

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